BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling	)	**DA 05-2680**
Regarding Self-Certification	)	**WC Docket 05-283**
of IP-Originated VoIP Traffic	)	
	)	

REPLY COMMENTS OF JOINT CLEC COMMENTERS

NuVox Communications, XO Communications, and Xspedius Communications, Inc. ("Joint CLEC Commenters"), by their attorneys and in accordance with the FCC's Public Notice, DA 05-2680, released on October 12, 2005, hereby submit their replies to the initial comments filed in repsonse to the Petition for Declaratory Ruling filed by Grande Communications, Inc. ("Grande").[1] As set forth herein, the Grande Petition made a narrow request of the FCC predicated on the existing access charge exemption. Despite the wide-ranging comments of the interested incumbent local exchange carriers ("ILECs") ILEC community, the Commission should stay on task and rule that local exchange carrier ("LEC") that receive a certification from a customer (or would-be customer) that the customer is an ESP or that the traffic the customer will send is enhanced, VoIP-originated traffic ("Certified Traffic"), the LEC may rely upon that certification to provide the customer with local business services, pursuant to the Commission's enhanced services access charge exemption, and otherwise treat the customer's traffic as local traffic. The opening comments do not compel a different result.

I. INTRODUCTION

In their opening comments, the Joint CLEC Commenters supported an expeditious grant of the *Grande Petition*. They noted that the ruling Grande requested would not jeopardize the

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[1] Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket 05-283, October 3, 2005 ("Grande Petition").

rights of a terminating LEC or other person that seeks to pursue access charges or impose liability on a LEC receiving and relying on such a certification, *provided* access charges are legitimately due on the traffic in question *and the LEC or other person attempting to impose that liability meets its burdens of proof vis-à-vis the LEC receiving the certification*. For example, if the terminating LEC seeks to impose access charges on an intermediate LEC, it would have the burden of proof to demonstrate that there is liability under applicable tariffs or contracts *and* that such tariffs or contracts are consistent with federal regulations which provide, as a general matter, that access charges may *not* be assessed on LECs. As such, the Joint CLEC Commenters anticipated and addressed the concerns of several LECs who mistakenly assume that the Petition seeks a ruling that the type of certification that Grande describes would create an unrebuttable presumption that Certified Traffic is exempt from access charges.[2]

In these reply comments, the Joint CLEC Commenters wish to address three principal arguments made by the ILEC commenters. First, several ILECs contend that the Grande petition improperly assumes that VoIP-originated traffic that undergoes a net protocol conversion – from Internet Protocol to Time Division Multiplex ("TDM") format – is an enhanced service. Second, some ILECs argue that the enhanced services access charge exemption applies to originating traffic, but not terminating traffic. Third, the ILECs also contend that the access charge exemption does not apply where the ESP uses the network of the terminating LEC in the same way as interexchange carriers ("IXCs"), which they claim is the case for the VoIP-originated Certified Traffic as defined in the Grande Petition.

As explained below, while the Commission need not reach these issues to grant the Grande Petition, the ILEC positions on these issues are incorrect under current law.

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[2] *See, e.g.*, Comments of BellSouth at 8.

II. DISCUSSION

The issues raised by the ILECs and identified above attacking the applicability of the ESP exemption are simply irrelevant to the matter at hand. The Grande Petition did not raise the question of whether VoIP-originated traffic should be subject to the enhanced services access charge exemption. Rather, Grande raised the different and more narrow question of whether, in the current environment, and in the absence of a Commission decision expressly regarding the nature of the traffic in question, a LEC could rely on a customer's certification that its traffic is enhanced absent knowledge that the certification is false. The sharply divided comments in the record of this proceeding make clear that even among the ILECs there is no clear basis for concluding that the Certified Traffic is not treated as enhanced and exempt from access charges under current law. (As discussed below, the Joint CLEC Commenters demonstrate that current law is clear that such traffic is enhanced.)

As the Joint CLEC Commenters explained in their opening comments, intermediate LECs are often, despite good faith reliance upon their customer's representations, caught in the middle of heated battles between terminating LECs seeking to recover access charges and service providers located "upstream." Indeed, the intermediate LECs themselves also often become the target of the terminating LECs who assume that the intermediate LECs were in partnership with upstream providers.[3] The Joint CLEC Commenters wish to emphasize, echoing the comments of others, that intermediate LECs should not have to prove endlessly that they are *not* causing harm or that they are *not* conspirators.[4] Consistent with the position the Joint CLEC

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[3] The Joint CLEC Commenters agree with the comments of Level 3 and Broadwing Communications that principles of joint liability, agency, or partnership do not apply where customers purchase services from intermediate LECs pursuant to contract or tariff. *See* Comments of Broadwing and Level 3 at 3-8.

[4] *Id.* at 2.

Commenters took in their opening comments, the burden of proof to collect access charges from such service providers resides with the terminating LECs.[5] As such, if the status of the traffic is uncertain (and here it is not even uncertain), until the terminating LEC demonstrates that the traffic is not, as represented, subject to treatment as enhanced traffic, intermediate LECs should not have the burden of determining whether a customer's representation is accurate or not. As explained in the Joint CLEC Commenters opening comments, however, if the intermediate LEC has knowledge sufficient to conclude that the traffic is not enhanced, the intermediate LEC cannot rely upon the certification of the customer. The Grande Petition also recognizes this.

Although the Commission need not reach the three ILEC arguments referenced above to decide in favor of the Grande Petition, those arguments are, in any event, wrong under current law. While the Commission in the future may decide to change its regulations, and the scope of the enhanced services access charge exemption in particular, in response to such arguments on policy grounds, the Commission is bound by its current rules until such time.

A. The Certified Traffic Is Enhanced. There is no meaningful debate by the ILECs that the Certified Traffic Grande's Petition describes undergoes a net protocol

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[5] Several ILEC interests argue that Grande's requested ruling would create an administrative nightmare that is not workable. *See, e.g.*, Comments of the Texas Statewide Telephone Cooperative at 1. The solution Grande seeks is only a temporary solution pending completion of the *IP-Enabled* and *Intercarrier Compensation* rulemakings, after which, hopefully, questions about the proper treatment of different types of IP-enabled services, such as the Certified Traffic will be confirmed or clarified on a prospective basis. Criticisms on the basis of administration of Grande's proposed relief overlooks the reality that, thanks to ILEC collection activities and accusations, intermediate LECs are caught between two battling camps – ILECs and self-certified ESPs – when trying to satisfy their obligations as common carriers in light of existing federal regulations, which include the access charge exemption. This reality is plainly the genesis of the Grande Petition and underscores its reasonableness. The real "nightmare" that ILECs seek to avoid is that, in this current environment, the ILECs may actually have to satisfy their burden in order to collect what they believe are their rightfully owed access charges and will have to demonstrate in specific circumstances how, despite the general prohibition in the FCC Rules against assessing access charge liability on intermediate LECs, intermediate LECs can be liable.

conversion.[6] Nonetheless, several ILECs contend that the Certified Traffic is not enhanced simply as a result of the conversion.[7] This contention flies in the face of the Commission's rules, which for the last twenty-five years have stated very clearly that net protocol conversion, is an enhanced service. Section 64.702 of the Commission's rules provides that

> "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, *protocol* or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.[8]

The Certified Traffic that Grande's Petition begins with the customer in a protocol that is acted upon and changed before it reaches Grande, namely it is converted from IP to TDM format.[9] As Grande describes in its Petition and others note in their comments, the Commission has consistently concluded that net protocol conversion services are enhanced services under the Act.[10] The passage of the 1996 Act did not change this treatment, because the Commission in interpreting the scope of the "information services" definition under the 1996 Act, confirmed in 1996 and again in 1997 that services previously deemed enhanced services by the Commission

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6 The Joint CLEC Commenters sharply disagree with the ILECs who contend that there is an ambiguity in the illustrative certification attached to the Grande Petition as to whether the traffic originates in VoIP format at the calling customer premises.

7 *See, e.g.*, Comments of USTA at 11-12 (mis-citing the *Access Charge Reform* decision, discussed *infra)*; Comments of Verizon at 4.

8 47 C.F.R. §64.702(a) (emphasis added).

9 As Broadwing and Level 3 have stated, VoIP-originated traffic may offer customers additional enhanced functionalities. Comments of Broadwing and Level 3 at 11-12. However, under the current law, a finding of such additional functionalities is not necessary to conclude that the certified Traffic as described in the Petition is enhanced and eligible for the access charge exemption.

10 Grande Petition at 7-17; Comments of Earthlink at 4-5; Comments of Global Crossing at 3-6.

are "information services."[11] The exceptions that exist – such as the internetworking exemption – simply do not apply to the scenario set forth in the Petition. As the U.S. District Court for the District of Minnesota found, referring to Vonage's services, "calls in the VoIP format must be transformed into the format of the PSTN before a POTS user can receive the call. For calls [to a VoIP customer] originating form a POTS user, the process of acting on the format and protocol is reversed. The Court concludes that Vonage's activities fit within the definition of information services."[12] The Court's analysis applies equally to the Certified Traffic.

The fact that access charges do not currently apply to the VoIP-originated traffic that terminates in a TDM protocol on the public switched network is underscored by the post-merger AT&T, which contends that access charges should apply to VoIP-PSTN traffic prospectively only.[13] The Joint CLEC Commenters cite the AT&T Comments, not because they agree with this position on a prospective basis, but because it reveals that the nation's largest ILEC acknowledges that, under current law, access charges do not currently apply. This supports the reasonableness of the ruling that Grande seeks, although it is not necessary to it.

B. The Access Charge Exemption Applies to Terminating Traffic. Several ILECs contend that the enhanced service provider exemption applies only when the customer of

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11 *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, 11 FCC Rcd 21095, ¶¶ 102-104 (1996); *Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, ¶ 789 (1997), *aff'd sub nom. Allenco Communications, Inc. v. F.C.C.*, 201 F. 3d 608 (5th Cir. 2000).

12 *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993,999 (D. Minn.), *aff'd*, 394 F. 3d 568 (8th. Cir. 2004). Time Warner contends that the fact that the Telecommunications Act of 1996 dropped the "protocol conversion" portion of the "enhanced services" definition when it created the "information services" definition demonstrates that net protocol conversion is no longer a tell tale sign that a service is enhanced. Comments of Time Warner at 3. The problem with this theory is that Section 64.702(a) of the Commission's Rules is still on the books and effective, providing that net protocol conversion is enhanced and not regulated under Title II.

13 Comments of AT&T at 2.

an ESP places a call to the ESP.[14] In short, the argument is that the access charge exemption applies only to originating traffic. There are two problems with this. In discussing the access charge exemption on repeated occasions, the Commission has never distinguished between originating and terminating access. More importantly, the Commission, when affirming the exemption in 1997, expressly stated that the exemption applies to the terminating side of enhanced service traffic.[15] Contrary to a number of ILEC commenters, the FCC made clear in the *Access Charge Reform* docket that the ESP exemption is *not limited to originating access.* Referring to both the 1983 and 1988 decisions in which the exemption was adopted and reaffirmed, the Commission noted that, "although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls," it had determined that ISPs should not be required to pay interstate access charges."[16] The Commission concluded, after reviewing arguments to lift or narrow the exemption, that enhanced service providers "should remain classified as end users for purposes of the access charge system."[17] The Commission did so without drawing a distinction between origination and termination.

The agency has not narrowed the exemption along these lines subsequently. Indeed, if it were otherwise, and the exemption was limited to originating calls to ESPs, the 2004 *AT&T Declaratory Ruling* could and should have been decided on this basis alone, because AT&T sought a ruling only with respect to the applicability of terminating access charges.

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14 Comments of USTA at 11; Comments of Century Tel at 3.

15 *Access Charge Reform*, 12 FCC Rcd 15982, 16131-16135 (1997), *aff'd Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

16 *Id.* at 16131-16132, *citing MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 FCC 2d 682, 711-722 (1983) and *Amendment of Part 69 of the Commission's Rules relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

17 *Access Charge Reform*, 12 FCC Rcd at 16134-16135.

In short, claims that the exemption applies only when the customer of the enhanced services provider places a call to the ESP are simply unfounded. Consequently, the scope of the exemption in this regard can only be changed prospectively and in a rulemaking proceeding. The Grande Petition does not place this issue before the Commission. Any modification to the scope of the exemption is appropriate in either the *IP-Enabled Services* or *Intercarrier Compensation* proceedings. It cannot be addressed here.

C. The "Similar Use" Arguments of the ILECs Belie the Current Exemption.

BellSouth and a few other ILECs argue that the access charge exemption applies only when enhanced service providers use terminating LEC facilities in a fundamentally different manner than IXCs.[18] Other ILECs maintain that the Grande Petition is at odds with the FCC's repeated statements that all traffic should be treated on same footing.[19] These arguments overlook the undisputed existence of the access charge exemption. What is the exception for if not to address the situation where access charges otherwise would apply, which presupposes that *the ESP uses the functionalities of the terminating LEC's network in the same manner as an IXC?* Without the exemption, access charges would apply. As noted repeatedly in this docket, the FCC has current rulemakings to address whether and, if so, how to continue with the exemption on a prospective basis. The Commission statements to which the ILECs refer in their comments are merely statements of policy that address what the Commission intends to or might do in the future. Again, the Grande Petition does not present the opportunity to craft modifications to the existing exemption, upon which Grande's request for relief rests. By the same token, a grant of the

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[18] Comments of BellSouth at 2; Comments of USTA at 3; Comments of ITTA, *et al.* at 4.

[19] *See, e.g.*, Comments of Verizon at 2.

Grande Petition would not prejudge those rulemakings, just as the Commission's declaratory rulings on IP-enabled traffic released in 2004 and 2005 did not.

The ILEC argument that the exemption applies solely because ESPs do not use the local network in the same way as do IXCs relies on the 1998 U.S. Court of Appeals for the Eighth Circuit Decision in *Southwestern Bell Telephone Co. v. FCC.*[20] As an initial matter, this decision upholds the exemption and affirming the commission's *Access Charge Reform* decision discussed above, where, as discussed earlier, the Commission expressly noted that the exemption applies to the origination *and termination* of interstate traffic. The Court rejected arguments that the Commission had abused its discretion in affirming the exemption on two grounds, first on the grounds that the FCC had noted that ESPs "utilize the local networks differently than do IXCs,"[21] and second, on the Commission's determination that the exemption "avoids disrupting the still evolving information services industry and advances the goals of the 1996 Act ... ."[22]

Thus, it is clear that the Eighth Circuit decision was neither predicated on nor limited to situations where it can be demonstrated that the enhanced service providers use the local network differently than IXCs. In fact, even the Court's decision recognized that the Commission, in affirming the access charge exemption, had not made an absolute finding that enhanced service providers use the network in a different way than IXCs: "Here we agree with the FCC that 'it is *not clear* that ISPs use the . . . network in a manner analogous to IXCs.'"[23] In other words, it is plain that the Commission reaffirmed the exemption, and the Court subsequently upheld that decision, *without concluding that it does not apply where the enhanced service provider uses the*

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20 153 F.3d 523 (8th Cir. 1998).

21 *Id.* at 544.

22 *Id.*

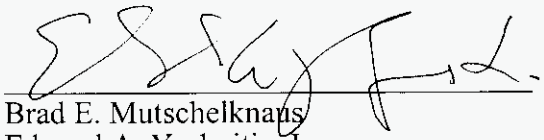
23 *Id.* at 542 (quoting *Access Charge Reform,* 12 FCC Rcd at 16133) (emphasis added).

network in the same way as an IXC. The bottom line is that the Eighth Circuit upheld the exemption as adopted first in 1983, which covered both originating and terminating minutes.[24] The arguments that the ILECs make on the theory of "similar use" can, therefore, have only prospective application, if any, and they are irrelevant for this proceeding.

III. CONCLUSION

For the foregoing reasons, and those given in the opening comments of the Joint CLEC Commenters, the Commission should approve expeditiously the Grande *Petition*.

Respectfully submitted,



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[24] Because the exemption applies to terminating as well as originating traffic, terminating carriers cannot simply compare calling party number with called party number to determine if the traffic is subject to access charges, contrary to the arguments of several ILECs. *E.g., Comments of BellSouth* at 5-6. The fact that enhanced services traffic may present some of the characteristics of traditional circuit switched telecommunication traffic does not render it ineligible for the exemption. As UTEX notes, in order to terminate VoIP-originated traffic on the public switched network, it is necessary to endow that traffic with certain characteristics after conversion from IP, which may include a calling party number from a distant exchange, which prevents the switches of the terminating LEC from being able to distinguish that traffic from traditional telephone traffic. Comments of UTEX at 9-10.

CERTIFICATE OF SERVICE

I, Patricia A. Bell, hereby certify that on this 11th day of January 2006, copies of the foregoing **"Reply Comments of Joint CLEC Commenters"** were: 1) filed with the Federal Communications Commission via its Electronic Comment Filing System; 2) served, via e-mail, on Jennifer McKee, *Pricing Policy Division, Wireline Competition Bureau at* jennifer.mckee@fcc.gov; and 3) served, via e-mail, on Best Copy and Printing, Inc. at fcc@bcpiweb.com.

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